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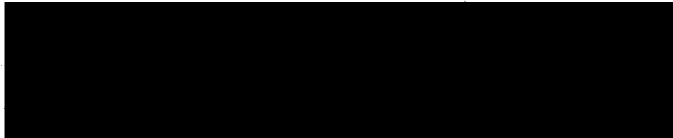
U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: WAC 01 242 55464

Office: CALIFORNIA SERVICE CENTER

Date: **JAN 15 2003**

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rosenberg

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the employment-based preference visa and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California corporation that is engaged in trade. It seeks to employ the beneficiary as its president and, therefore, endeavors to classify the beneficiary as a multinational executive or manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C).

The director denied the petition on the basis that the proffered position is neither executive nor managerial in nature.

On appeal, counsel submits a brief statement, a copy of one employee's bachelor of science degree, and descriptions of a financial manager position and an advertising, marketing, promotions, sales and public relations position from the Department of Labor's Occupational Outlook Handbook (Handbook).

Section 203(b) of the Act states, in pertinent part:

- (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The petitioner, which was established in 1999, claims to employ five persons and have a gross annual income in excess of \$1 million. According to the petitioner, the beneficiary is currently occupying the position of president as an L-1A nonimmigrant worker, which the petitioner describes as follows:

Formulate the goals and policies of the corporation such as sales territory determination, key account management strategy, pricing standard, product line determination, etc.; hire and fire managerial and professional employees and supervise their work;

represent the corporation in all events; direct and develop operation of the corporation and exercise all other discretionary decision making power for the corporation.

In addition, the petitioner states that the beneficiary, in the position as president, executes the following daily activities:

- (1) Reads emails & faxes from Taipei offices and all other clients (15%)
- (2) Dictates to secretary on replying [to] emails and faxes (15%)
- (3) Assigns work to employees, sets performance goals and deadlines to meet, and give[s] instruction of what to do (10%)
- (4) Contacts potential or existing key account customers and/or vendors to represent the company in contract discussion; determines contract terms and makes adjustment; and exercises discretion on various contract commitment and performance details (25%)
- (5) Meets with sales to understand transaction progress and problems encountered, and makes decision on pricing and other major terms and problem resolution solutions (10%)
- (6) Reviews market condition information to make decisions on adding new product and potential new accounts; gives instructions to employees concerning new products and accounts (10%)
- (7) Meets with employees to discuss daily correspondence, and gives employees direction (5%)
- (8) Trains employees on company policies, operational procedures and priority, and supervises their work; hires and fires employees and necessary (5%)
- (9) Exams [sic] accounting and financing documents, determines company budget, approves spending, and monitors cash flow (5%)

The petitioner also submitted an organizational chart for its operations, which indicated that the proffered position's responsibilities included the supervision of a treasurer/chief, a secretary, a customer service representative, and a sales manager.

The director found that the proffered position was neither executive nor managerial in nature, and she denied the petition on this basis. The director concluded, in part, that the type of business in which the petitioner is engaged "does not require or

have a reasonable need for an executive because all they do is buy and sell products." The director found that the petitioner did not have a complex organizational structure to warrant the employment of an individual in a primarily executive or managerial capacity. Regarding the petitioner's employees, the director stated that the proffered position was, at best, a general managerial position and that none of the employees supervised by the president were professionals.

On appeal, counsel states that the director's decision was arbitrary, illegal and contrary to the evidence in the record. Counsel claims that the duties of the proffered position qualify as executive or managerial duties because they are primarily in the areas of policy-making, decision-making, and supervisory responsibilities. Counsel also contends that the two employees who are supervised by the president are professional because one individual holds a bachelor's degree and the other individual holds a master's degree. Finally, counsel states that the statute was not enacted to prevent small companies from being able to classify an individual as a multinational executive or manager.

Pursuant to 8 C.F.R. 204.5(j)(2):

Executive capacity means an assignment within an organization in which the employee primarily:

- (A) Directs the management of the organization or a major component or function of the organization;
- (B) Establishes the goals and policies of the organization, component, or function;
- (C) Exercises wide latitude in discretionary decision-making; and
- (D) Receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

Managerial capacity means an assignment within an organization in which the employee primarily:

- (A) Manages the organization, or a department, subdivision, function, or component of the organization;
- (B) Supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (C) If another employee or other employees are

directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- (D) Exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

If staffing levels are used as a factor in determining whether an individual is an executive or manager, section 101(a)(44)(C) of the Act requires the Service to consider the reasonable needs of the organization in light of its overall purpose and stage of development. A company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. Systronics Corp. v. I.N.S., 153 F.Supp.2d 7 (D.D.C. 2001).¹

The petitioner's employees in addition to the president are described as:

- Treasurer/chief - "accounting reporting to president"
- Secretary - "assist [in] correspondence and market research"
- Customer service representative - "order processing and shipping document"
- Sales Manager - "assist president to develop business"

It is clear from the petitioner's staffing levels that it did not have a reasonable need to employ an individual in an executive or managerial capacity at the time the petition was filed. The actual duties of the employees listed above reveal the true nature of their employment; they merely hold clerical positions within the petitioner's operations. For example, the secretary and the customer service representative perform clerical tasks such as preparing orders and documents, and preparing correspondence. The treasurer's job responsibility involves routine bookkeeping functions, while the sales manager's job involves assistant duties. Given these staffing levels, the

¹ The petitioner's reasonable need for a multinational executive or manager is based upon its organizational structure at the time the petition was filed - April 30, 2001. A petitioner must establish eligibility at the time of filing the immigrant petition; an immigrant petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971)

beneficiary would be required to perform the services of the company such as sales and marketing, a conclusion which is supported by the petitioner's description of the proffered position's daily activities. According to this description, the beneficiary spends at least 25% of his time performing duties that are related to sales and marketing. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593 (BIA 1988).

Counsel attempts to show that the positions of treasurer/chief and sales manager are professional positions because the individuals who occupy these positions hold at least a bachelor's degree or higher. The Service is not persuaded by counsel's evidence. The duties of a position determine whether that position may be considered managerial, supervisory or professional in nature. Neither the title of the position nor the Department of Labor's description of an occupational specialty in the Handbook provides the insight into a position's level of authority and specific responsibilities that the Service requires. Here, there is nothing in the job descriptions of the treasurer/chief and sales manager positions that persuades the Service to find that either position is managerial, supervisory or professional in nature. Rather, these two positions do not carry any level of responsibility that is higher than a clerical position.

Specifics are clearly an important indication of whether an applicant's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. Fedin Bros. Co., Ltd. v. Sava, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), aff'd, 905 F. 2d 41 (2d. Cir. 1990). The petitioner has not shown that the proffered position involves the high level responsibilities that are specified in the definitions of executive capacity and managerial capacity. The petitioner has submitted skeletal job descriptions for its employees and no information regarding how the petitioner functions on a daily basis in light of its organizational structure. Accordingly, the director's decision to deny the petition will not be disturbed.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.